FILED
OCT 25 2006
OFFICE OF THE CLERK

(6)

No. 06-144

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITIONER'S REPLY BRIEF

WINTHROP A. ROCKWELL
JOHN P. BORGER
JAMES A. O'NEAL
BRUCE JONES
JOHN P. MANDLER
Faegre & Benson LLP
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
CHARLES A. ROTHFELD
MIRIAM R. NEMETZ
ANDREW E. TAUBER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

TABLE OF CONTENTS

		Page
A.	FIFRA PREEMPTS THE STATE LAW LABELING REQUIREMENTS APPLIED BELOW	1
B.	*BATES* REQUIRES THAT THE JURY BE INSTRUCTED ON FIFRA'S REQUIREMENTS	6
C.	THE HOLDING BELOW VIOLATES THE FIRST AMENDMENT	8
CONCLUSION		10

TABLE OF AUTHORITIES

Page(s)

CASES

Bates v. Dow Agrosciences, LLC, 544 U.S. 431 (2005) 3, 5, 7, 8, 9

Illinois ex rel. Madigan v. Telemarketing Assoc., Inc. 538 U.S. 600 (2003) 9,10

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 6

Nike, Inc. v. Kasky, 539 U.S. 654 (2003) 10

STATUTES, RULES AND REGULATIONS

7 U.S.C. § 136a(c)(5)(B) 3

7 U.S.C. § 136v(B) 3

40 C.F.R. § 152.15 4

40 C.F.R. § 152.42 4

40 C.F.R. §152.43 4

40 C.F.R. § 152.130(B) 3, 4

40 C.F.R. 158.175 4

MISCELLANEOUS

U.S. Environmental Protection Agency, Label Review Manual (3rd ed. Aug. 2003) 5

EPA Label Review Manual 5

Respondents' brief in opposition offers a dizzying rehash of their summation to the jury. We lack the space to correct respondents' many factual misstatements, although we address below some of their most misleading assertions. The crucial point, however, is that respondents' overheated rhetoric cannot obscure the important and recurring *legal* questions presented here. Respondents' brief leaves it essentially undisputed that the Minnesota Supreme Court imposed state-law liability for actions that are required or expressly authorized by FIFRA and its implementing regulations. That court also allowed respondents to construct a case out of direct, repeated attacks on the accuracy of BASF's pesticide labels – while holding that the jury need *not* be instructed on FIFRA's labeling rules. And the decision below premised liability on concededly truthful speech that actually *facilitated the enforcement of federal law*. Leaving those holdings intact will frustrate important federal regulatory policies, foment litigation by permitting plaintiffs to circumvent FIFRA preemption through the use of semantic gamesmanship, and chill protected speech. Further review therefore is in order.

A. FIFRA Preempts The State Law Labeling Requirements Applied Below

Respondents' principal argument is that their claim escapes preemption because they do not challenge the accuracy of BASF's labels. Instead, they say, their lawsuit is directed at assertedly fraudulent marketing and advertising – in particular, at what they characterize as BASF's failure to publicize Poast Plus's EPA registration status. See Br. in Opp. 3, 4, 9, 12, 23, 24, 26. For several reasons, this contention is wrong.

1. First, as we showed in the petition (at 14-19), respondents' theory of liability ultimately reduces to the claim that BASF committed an "unconscionable commercial practice" by declining to label Poast Plus for use on minor crops in all

50 states. That necessarily is so. The alleged harm suffered by the nationwide class of respondents stemmed from their inability to use Poast Plus on minor crops. See Br. in Opp. 13-16. But respondents were not, and could not have been, injured in this regard by anything BASF said (or failed to say) in its marketing or other public statements about the EPA registration status of Poast Plus. Instead, it was *the omission of minor crops from the product's label and the absence of state registration for those crops* that precluded respondents from legally using Poast Plus as they wished. Respondents' "injury" thus followed, not from BASF's statements, but from the failure to list minor crops on the Poast Plus label. Respondents' real theory accordingly must be that BASF was obligated by New Jersey's consumer protection law to label, obtain state registration, and sell Poast Plus for use on all crops for which the product was registered with the EPA.

There can be no doubt that this was the theory of liability propounded by respondents and embraced by the court below. We showed in the petition (at 6-8) that respondents established their claim at trial largely through repeated, inflammatory testimony that the Poast Plus label was "false," "deceptive," and "lied" because it did not list minor crops or report that the EPA had registered the product for use on those crops; respondents do not deny their pervasive use of such evidence. We also showed (at Pet. 15) that respondents sought damages for every gallon of Poast sold nationwide for use on minor crops during the class period, a damages claim that ultimately had to be premised on the theory that BASF was legally obligated to label Poast Plus for use on minor crops in all 50 states; again, respondents make no response. Most notably, respondents *do not deny* that state law, as interpreted by the court below, requires pesticide manufacturers to label their products for use on all crops for which they are registered with the EPA. The Minnesota Supreme Court read the governing state law the same way: the court did not

dispute BASF's showing that respondents' "claims would require marketing products in all 50 states and on all crops for which they are EPA-registered." Pet. App. 17a. But the court rejected BASF's challenge to that state-law rule as "a policy-oriented argument that is not founded on the preemption criteria under FIFRA." *Id.*.

In reaching this conclusion, the court below misunderstood FIFRA and departed from *Bates*. The Minnesota court interpreted state law to impose liability on BASF for failing to label Poast Plus for use "on all crops for which [it is] EPA-registered." Pet. App. 17a. Because that rule hinges liability on the contents of the Poast Plus label, it is expressly preempted by FIFRA, which provides that, once the EPA determines that a pesticide label "compl[ies] with [FIFRA's] requirements" (7 U.S.C. § 136a(c)(5)(B)) – as Poast Plus's label unquestionably did – a state "shall not impose or continue in effect any requirements for labeling * * * in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). See *Bates*, 544 U.S. at 452. By the same token, the decision below conflicts with substantive FIFRA labeling requirements by denying manufacturers an option expressly provided by federal law: the right to obtain a broad EPA registration for their pesticides while labeling and seeking state registration for only a subset of those uses. See 40 C.F.R. § 152.130(b); Pet. 16-19.

2. The rule applied below also is preempted for a second, closely related reason. We showed in the petition (at 16-17) that respondents sought to premise liability on the ground that Poast and Poast Plus are identical products and that it was an "unconscionable commercial practice" for BASF to market the pesticides under different names, for different uses, and at different prices. Respondents now *expressly acknowledge* that this was a central element of the theory on which they presented the case and the lower courts imposed liability: "Minnesota jurors and appellate judges readily understood that BASF deceptively marketed Poast and Poast

Plus as different products, at different prices, as a 'system of deceit' to extract inflated prices from minor crop farmers." Br. in Opp. 27. See *id.* at 7 ("BASF defrauded thousands of farmers by deceptively marketing the same herbicide as different products"), 9 ("BASF engaged in a national 'system of deceit' * * * by marketing the same herbicide as different products").[1]

This ground for recovery, however, is flatly inconsistent with federal law. Federal regulations defined Poast and Poast Plus as different products and required BASF to register and label them under different names. Poast and Poast Plus are chemically different, as respondents admitted below (AA-747-748); they have different chemical formulas (Tr.1253:9-12; 1256:2-5; 1435:12-19), ingredients (Tr.2682:3-10), concentrations of solvent (Tr.2731:19-2732:2), tank mix compatibilities (Tr.3006:4-10), crop injury risks (AA-412; 498-500), and human skin irritation properties (AA-470-473; 511). At trial, the director of EPA's Office of Pesticide Programs during the relevant period accordingly testified that, because Poast and Poast Plus had different percentages of active ingredients and different inert ingredients, BASF was *required* to register the two products separately (Tr. 2562:12-2563:5, 2564:9-2565:13, 2566:7-10, 2568:9-2569:20) and name the two products differently (Tr:2569:21-2470:12; 2572:9-14; 2573:6-20).

EPA regulations confirm that testimony. Because of their chemical differences, EPA regulations *required* BASF to register Poast and Poast Plus as *separate* products; to label and market them under *different* names (40 C.F.R. §§ 152.15,

---

[1] In rejecting BASF's argument on this point, the court below opined that respondents did not argue "that the two products [should] be labeled as one." Pet. App. 17a. But respondents' brief in this Court itself belies the state court's observation – an observation that, we respectfully suggest, mischaracterizes the course of proceedings below.

152.42-.43, 158.175; U.S. Environmental Protection Agency, Label Review Manual (3rd ed. Aug. 2003) Ch. 12: Labeling Claims); and to submit *separate* toxicology data for each (see 40 C.F.R. § 158.340). Respondents do not dispute these requirements, instead simply ignoring this point. They accordingly offer no reason to doubt that the court below imposed a labeling requirement that clashes with federal law.

3. The issue presented here is a recurring one of substantial importance. *Bates* should have settled that, although FIFRA does not preempt state-law suits relating to pesticide safety and efficacy, the statute and its implementing regulations *do* preclude claims that challenge the adequacy of EPA-approved pesticide labels. But on remand after *Bates*, the court below evaded *Bates*' conclusions regarding FIFRA's labeling rules by endorsing a theory of liability that, in its practical operation, requires manufacturers to label and sell pesticides for all EPA-registered uses in all 50 states.

This holding turns the *Bates* analysis upside down. As this Court emphasized, the EPA does not itself test, or in most instances even review, the efficacy or crop safety of pesticides. See 544 U.S. at 440. Instead, *manufacturers* bear responsibility for such testing: the Court in *Bates* explained that, even after EPA registration, manufacturers have a "continuing obligation" to "use the utmost care in the business of distributing inherently dangerous items." *Id.* at 438, 450. The obligation to ensure pesticide safety also is shouldered by state authorities, who play a "broad role" in approving the use of pesticides for particular purposes. *Id.* at 450. The holding below, however, obligates pesticide manufacturers to label and sell *all* their products for *all* EPA-registered uses in *all* 50 states or face massive damages liability – even when (as in this case) the manufacturer believes that there has been inadequate safety testing or when (also as in this case) the affected states do not approve (or actually have disapproved)

the proposed uses.[2] This holding disrupts the federal/state "regulatory partnership" established by FIFRA (*Wisconsin Pub. Intervenor Mortier*, 501 U.S. 597, 615 (1991) and poses a grave threat to the Nation's system of pesticide regulation.[3]

The Minnesota Supreme Court's holding also places pesticide manufacturers in an intolerable bind. When faced with the prospect of trebled damages liability in national class actions for failure to label their products for all EPA-registered uses, manufacturers no longer will be able to find a safe harbor in compliance with FIFRA's labeling regulations or to rely on EPA's guidance that "the label is the law." See Pet. 18. Instead, they will be forced either to rush their EPA-registered pesticides to market without adequate safety testing, or to delay registration of new pesticides. In either case, the policies of the federal regulatory scheme will be substantially undermined. To the extent the Court has any doubts on that score, it may wish to invite the Solicitor General to express the views of the United States on the question.

B. *Bates* Requires That The Jury Be Instructed On FIFRA's Requirements

As we argue in the petition (at 21-23), the Minnesota Supreme Court compounded its substantive error regarding the scope of FIFRA preemption by holding that BASF was not entitled to jury instructions on the contents of FIFRA's labeling rules. The brief in opposition confirms the merit of this point. Respondents do not dispute that they bombarded the

---

[2] The court below expressed skepticism about BASF's "concerns for safety and the need for additional testing." Pet. App. 17a-18a. But the undisputed record shows that BASF scientists insisted – in writing – on additional safety testing before Poast Plus was labeled for use on minor crops. See Pet. 5.

[3] BASF was held liable to California class members even though California affirmatively refused to register Poast Plus for *any* use. Pet. 5 n.1.

jury with evidence and argument attacking the accuracy of BASF's labels, challenging BASF's entitlement to engage in subset labeling, and asserting that Poast and Poast Plus are identical products that should have been identically labeled. See Pet. 6-8 (citing record). All of this argument and evidence exhorted the jury to find BASF liable for engaging in conduct that was explicitly authorized or required by FIFRA. *Bates* addressed precisely this sort of danger by holding that "a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards." 544 U.S. at 454. The court below departed from *Bates*, and committed a fatal error, in holding such an instruction unnecessary here.

Respondents make no serious attempt to address this issue. They do not deny that their evidence and argument challenged the veracity of BASF's labels or that, as a result, jury confusion was virtually unavoidable. Their only real contention on the merits of this point is that FIFRA instructions were unnecessary because this case supposedly did not involve a state-law claim of deceptive labeling. Br. in Opp. 29. For reasons we explain above and in the petition (at 6, 14-16), that argument ignores the nature of respondents' claim before the jury and the description of that claim in respondents' complaint. But more fundamentally, respondents' approach would render wholly nugatory *Bates*' guidance regarding the importance of FIFRA instructions.

Respondents argue that plaintiffs may (as they did here) accuse a pesticide manufacturer of engaging in a vague "unconscionable commercial practice * * * in relation to [its] marketing and pricing strategies" (Br. in Op. App. A1), while proving their case (as they also did here) by inundating the jury with testimony that EPA-approved labels were "false" and "deceptive." Respondents also say that, in doing so, plaintiffs may preclude the jury from receiving instructions on the FIFRA and EPA rules *authorizing or mandating use of those very labels*. If respondents are correct, it is inevitable

that juries will hold manufacturers liable under state law for mislabeling pesticides in circumstances where the manufacturer could not "also [be] liable for misbranding as defined by FIFRA." *Bates*, 544 U.S. at 454. Approving this sort of semantic hair-splitting – as did the court below – will lead to the very result that *Bates* meant to forestall.

Perhaps because they recognize the flaws in their position on the merits, respondents place principal weight on their contention that BASF waived its jury instruction argument below. Br. in Opp. 2, 5-6, 29. This contention is insubstantial. We explained in the petition (at 23 n.6) that *Bates* itself first expressly articulated the federal-law entitlement to FIFRA instructions in cases like this one; as a consequence, even if BASF had not advanced its jury instruction argument prior to *Bates* (which it did), as a matter of federal law BASF "should [have] be[en] allowed to address those matters on remand" from this Court after *Bates* was decided. 544 U.S. at 453 n.27.[4] The state court accordingly was not free to decline to address BASF's entitlement to FIFRA instructions, and that court's waiver analysis does not present an independent state ground that precludes review in this Court. Although we made this point in the petition, respondents make no response at all. The Court should not countenance this attempt circumvent the Court's ruling in *Bates*.

C. The Holding Below Violates The First Amendment

The short shrift respondents give to the First Amendment question presented in the petition should not disguise the importance of the issue or the magnitude of the lower court's

---

[4] As we explain in the petition (at 23 n.6), BASF *did* properly advance its jury instruction argument below. In addition, as we also explain (see *ibid.*), the Minnesota court's waiver analysis is interwoven with federal law and therefore cannot serve as an independent state ground that precludes review in this Court.

error. Respondents appear to acknowledge the essential elements of BASF's First Amendment claim. They recognize that BASF's speech – the magazine article it sponsored describing the sanctions for off-label use of pesticides and its complaints of possible off-label use to law enforcement authorities – was a basis for the jury's finding that BASF engaged in "unconscionable commercial practices." Indeed, respondents emphasize the centrality of BASF's speech to their theory of liability. See Br. in Opp. 16-17, 18. Respondents likewise do not deny that BASF's speech was entirely truthful, a point they conceded below. See Pet. 8, 24. And they do not take issue with our argument that the holding below conflicts with the rulings of federal courts of appeals and state courts of last resort, which have held that truthful speech may not be used to establish liability under laws targeting unfair business practices. See Pet. 26.

In nevertheless opposing review, respondents contend that "[f]raudulent marketing representations are never protected speech." Br. in Opp. 30.[5] That observation is wholly beside the point here. The decisions cited by respondents involved "misleading affirmative misrepresentations." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 618 (2003); see *id.* at 608-609.[6] In contrast, respondents here used concededly *truthful and nonmisleading* speech to establish liability for an "unconscionable commercial practice."

---

[5] Respondents' contention that BASF waived the First Amendment argument (Br. in Opp. 1, 2) is frivolous. The issue was presented in BASF's pre-*Bates* petition to the Minnesota Supreme Court (see Pet. 9) and in its first petition to this Court. Although the issue was not entertained by the Minnesota court on remand from this Court after *Bates*, in an abundance of caution BASF expressly noted below that it preserved the issue. See Minn. Sup. Ct. Br. 18 n.5.

[6] The decisions other than *Telemarketing Associates* cited by respondents at Br. in Opp. 30 simply observe that misleading commercial speech is not entitled to constitutional protection.

This Court has never suggested that truthful speech may be punished in such circumstances. Indeed, the Court's warning that "[s]imply labeling an action one for 'fraud,' of course, will not carry the day" (*id.* at 617), is aimed directly at arguments like the one advanced by respondents here.

In *Nike*, five Justices identified the danger that punishing truthful speech will chill valuable communication as a matter of serious concern. See Pet. 28-30. Respondents maintain that *Nike* was materially different from this case because, unlike the *Nike* plaintiff, they have no "ideological" ax to grind. Br. in Opp. 30. But that argument, too, is beside the point. The possibility that valuable debate will be suppressed must be viewed from the perspective of the defendant, whose speech is being curtailed. And BASF's speech here – valid complaints to public authorities and an accurate magazine article addressing what respondents concede to be matters of "public concern" (see Pet. 24) – deserves at least as much constitutional protection as *Nike*'s paid advertisement.

There is no gainsaying the practical importance of the issue presented here – and respondents do not deny it. Any number of accurate statements may be made the basis for liability under the holding below, and all commercial actors will be forced to limit their speech for fear of triggering damages liability under standardless state consumer laws. Respondents argued below that "the consumer fraud act cannot be trumped by the First Amendment" (10/11/01 Mot. in Lim. Tr. 176:3-4), and that is now the law in Minnesota. In these circumstances, "[t]he interest in protecting such participants [in public debate] from the chilling effect of the prospect of expensive litigation is * * * a matter of great importance." *Nike, Inc. v. Kasky* 539 U.S. 654, 664 (2003) (Stevens, J., concurring). Further review therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WINTHROP A. ROCKWELL
JOHN P. BORGER
JAMES A. O'NEAL
BRUCE JONES
JOHN P. MANDLER
Faegre & Benson LLP
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
CHARLES A. ROTHFELD
MIRIAM R. NEMETZ
ANDREW E. TAUBER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

OCTOBER 2006